COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3558-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN E. BURKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Susan Burks appeals her judgment of conviction for operating while under the influence of an intoxicant, third offense, contrary to WIS. STAT. § 346.63(1)(a). Burks argues that the circuit court erred by denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

her motion to suppress the results of a blood test when the blood was drawn without her consent as a search incident to an arrest and after she had refused the test. Burks contends that the implied consent statute creates procedural and substantive due process rights and supplies the exclusive remedy for a defendant's refusal to submit to a chemical test to determine blood alcohol content. We disagree and affirm the conviction.

BACKGROUND

¶2 The facts are undisputed. On January 22, 2000, Burks was stopped for operating a motor vehicle while under the influence of an intoxicant. She was arrested and transported to a local hospital. Burks was read the Informing the Accused form, pursuant to WIS. STAT. § 343.305(4). Burks was then asked if she would submit to a blood test. She answered no.

¶3 After Burks refused to submit to the blood test, the arresting officer issued her a Notice of Intent to Revoke Operating Privileges. She was then advised that the blood would be drawn for evidentiary reasons. Burks was restrained and the blood was taken.

¶4 Burks moved to suppress the blood test. The circuit court denied the motion. This appeal followed.

STANDARD OF REVIEW

¶5 This appeal presents a legal question, specifically, whether the implied consent law provides the exclusive remedy upon a refusal to submit to evidentiary testing so that law enforcement cannot obtain evidence by other legal means. This court decides the issue independently of the circuit court. ***State v. Edgeberg***, 188 Wis. 2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994).

DISCUSSION

¶6 Burks argues that the implied consent statute is the exclusive remedy for a defendant's refusal to submit to a chemical test to determine blood alcohol content. She contends that the legislature has made no provision giving a police officer the option of ignoring a defendant's refusal to submit. According to Burks, a driver may refuse to submit to a chemical test as long as he or she is prepared to suffer the consequences of the statutory penalty.

¶7 The legislature enacted the implied consent law to combat drunk driving. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). The law was designed to facilitate the collection of evidence and to secure convictions, not to enhance the rights of alleged drunk drivers. ***Id.*** at 224. Given the legislature's intentions in passing the statute, courts construe the implied consent law liberally. ***Id.*** at 223-25.

¶8 Burks relies on ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995), which suggests that an OWI suspect has a right to refuse a chemical test, albeit subject to consequences:

> Every driver in Wisconsin impliedly consents to take a chemical test for blood alcohol content. Section 343.305(2), STATS. A person may revoke consent, however, by simply refusing to take the test. *See* [§] 343.305(9). Thus, a driver has a "right" not to take the chemical test (although there are certain risks and consequences inherent in this choice).

From this "right," Burks argues that when an arrested person refuses a chemical test, police efforts should cease and the officer should comply with the statutory procedures the legislature has created.

¶9 Burks' reliance on this passage is misplaced for two reasons. First, ***Quelle*** did not address the issue at hand; it was a "subjective confusion" case. The court therefore did not have an opportunity to evaluate its observation in light of the arguments Burks raises. It did not consider whether a suspect's refusal must be honored in all instances. The ***Quelle*** court merely meant that an OWI suspect has the right not to voluntarily take a test by "revoking" consent. This construction comports with cases that consistently hold that, under appropriate circumstances, a suspect's blood may be withdrawn regardless of consent. ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966); ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

¶10 Second, and more important, under Burks' interpretation, this passage from ***Quelle*** directly contradicts our supreme court's repeated holding that a driver in this state has no right to refuse to take a chemical test. "The consent is implied as a condition of the privilege of operating a motor vehicle upon state highways. By implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." ***State v. Zielke***, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987); *see also* ***Reitter***, 227 Wis. 2d at 225. "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Thus, Burks does not have a right to refuse to submit to evidentiary testing.

¶11 Burks fails to address the fact that refusal to submit to a chemical blood test under WIS. STAT. § 343.305 is a civil matter and a separate substantive offense from OWI under WIS. STAT. § 346.63(1). ***Zielke***, 137 Wis. 2d at 47-48.

> The point of departure for the court's analysis is the recognition that two separate substantive offenses are

> potentially operative in all prosecutions involving intoxicated use of a vehicle. The first offense which may arise in a case involving intoxicated use of a vehicle is refusing to submit to a chemical test under sec. 343.305(2), Stats. If a driver refuses to take a test he or she faces automatic license revocation. The second substantive offense may involve operating while intoxicated (OWI), sec. 346.63. The penalties for violation of th[is] statute may include all or a combination of fines, imprisonment and license revocation.

Id. at 47. Further, the ***Zielke*** court did not provide the exclusive means by which police could obtain chemical test evidence of driver intoxication. ***Id.*** at 41.

¶12 Also, in ***Bohling***, the defendant was arrested for OWI and refused to take an Intoxilyzer test. ***Id.*** at 534. He was then informed of the department's policy to administer blood tests. When he objected, the officer advised the defendant that restraint would be used if necessary. ***Id.*** at 534-35. The defendant's blood was eventually drawn without his consent. ***Id.*** at 535.

¶13 The ***Bohling*** court, relying on ***Schmerber***, 384 U.S. at 770-71, held that under exigent circumstances

> a warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Bohling, 173 Wis. 2d at 533-34 (footnote omitted). Burks does not contend that the four ***Bohling*** criteria were not satisfied under the facts of this case. Therefore, the blood draw, without consent, was proper.

¶14 Burks argues that the implied consent statute is "a sham and unnecessary façade as a prelude to forced blood draw" if police are allowed to ignore a suspect's refusal to submit to a blood test. However, ***Zielke***'s and ***Bohling***'s core principles are applicable and controlling in this case. Under ***Zielke***, the criminal prosecution for OWI is a separate matter from the implied consent violation. ***Id.*** at 47-48. Moreover, while it appears true that the implied consent law does supply the exclusive remedy for its violation, it does not follow that the statute precludes law enforcement from pursuing other constitutional avenues for collecting evidence of a traffic code violation. ***Zielke*** held that WIS. STAT. § 343.305 is not the exclusive means by which police can obtain chemical test evidence of driver intoxication. Further, under ***Bohling***, evidence resulting from a warrantless blood draw is admissible. ***Id.*** at 533-34.

¶15 Therefore, we conclude that Burks' procedural and substantive due process rights were not violated. The trial court properly denied Burks' motion to suppress blood test results.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.